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No. 91-1300

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Constitution prohibits a court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant committed perjury at trial.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 944 F.2d 178. The opinion dissenting from the denial of rehearing en banc, Pet. App. 18a-28a, is reported at 950 F.2d 149.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on November 13, 1991. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on February 10, 1992, and was granted on May 26,

1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

SENTENCING GUIDELINE INVOLVED

The 1989 version of Sentencing Guidelines § 3C1.1, which applied to respondent's sentencing, provided as follows:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

The current version of Sentencing Guidelines § 3C1.1 provides as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, respondent was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to 51 months' imprisonment, to be followed by a three-year term of supervised release. J.A. 40-41. The court of appeals affirmed her conviction, but vacated her sentence and remanded the case for resentencing.

1. Respondent belonged to an organization headed by Freddie Harris, a cocaine dealer in the Charleston, West Virginia, area. The ring was broken up in the late summer of 1988. Harris and a number of co-conspirators subsequently pleaded guilty to cocaine distribution charges. Pet. App. 2a.

Respondent was charged with conspiring to distribute cocaine with Harris and others during the summer of 1988. At respondent's trial, Harris and four other former co-conspirators testified against her. The evidence showed the following: Respondent served as Harris's source of cocaine in Cleveland, Ohio. On several occasions during the summer of 1988, she traveled to Cleveland alone, with Harris, and with another conspirator to obtain cocaine and other drugs. Respondent was also involved in the testing, preparation, and packaging of cocaine for Harris's organization. She tested and packaged cocaine at her apartment, and she employed her daughter to convert powdered cocaine into the form known as "crack" and to sell it in that form. Pet. App. 2a-4a; Tr. 6-17, 52-56, 67-68, 81-102, 115-118, 141-142, 152-155, 164-165, 173-177.

Respondent's defense was simple; as the court of appeals put it, she "took the stand and denied everything." Pet. App. 4a. Respondent testified that she did not buy, sell, or use cocaine and that she did not know anyone in Cleveland who did. She admitted traveling to Cleveland, but she testified that the purpose of those trips was to visit relatives. *Id.* at 5a. Respondent denied knowing whether anyone had manufactured crack cocaine at her apartment.

On cross-examination, the government asked respondent whether she had sold crack to an Edward Dickerson in the summer of 1988. Respondent denied having done so. Pet. App. 5a; Tr. 188-195, 198-205.

On rebuttal, Edward Dickerson testified that he became an informant in 1988 and that in the sum-

mer of that year law enforcement officials monitored a transaction in which he purchased crack cocaine from respondent at her apartment. The officer involved in the investigation corroborated Dickerson's testimony. Another cooperating co-conspirator also testified to having purchased crack cocaine from respondent. In addition, according to that witness, respondent gave crack and powdered cocaine to her daughter, who sold crack for respondent. Pet. App. 5a; Tr. 209-213, 232-235, 241-245. The jury convicted respondent.

2. At sentencing, the district court found that respondent lied when she testified at trial. The court therefore enhanced her offense level by two levels on the ground that, by committing perjury at trial, she had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. The court observed, J.A. 29:

> The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

The two-level enhancement increased respondent's offense level from 22 to 24. Because respondent's criminal history category was I, the sentencing range for respondent was 51-63 months' imprisonment. The district court sentenced respondent at the bottom of that range.

3. The court of appeals vacated respondent's sentence and remanded for resentencing. Pet. App. 1a-15a. The court acknowledged that every other circuit to consider the issue had upheld the constitutionality of applying the enhancement authorized by Sentencing Guidelines § 3C1.1 to defendants who perjured themselves at trial. The court stated, however, that "[o]ur sense of justice requires us to disagree." Pet. App. 10a. The court expressed a "fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him," because "[n]early all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony." *Ibid.* The court was disturbed by the prospect that "testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury." *Ibid.* The court concluded that many factors, such as the prospect of being impeached with a prior conviction, already discourage defendants from testifying, and the prospect of receiving an "automatic" enhancement under Sentencing Guidelines § 3C1.1 may lead a defendant to believe that testifying is not "worth the risk." Pet. App. 12a.

The court of appeals recognized that in *United States* v. *Grayson*, 438 U.S. 41 (1978), this Court ruled that a sentencing court may consider the fact that the defendant testified falsely at trial. Pet. App. 12a. Nonetheless, the court found that *Grayson* did not settle the question of the constitutionality of a "perjury enhancement" under the Sentencing Guidelines. "The most basic difference" between this case and *Grayson*, the court found, "is the stated justifica-

tion for enhancing sentence." *Ibid.* "The guidelines deem a denial of guilt on the stand 'obstruction of justice,' " the court stated, whereas *Grayson* allowed the trial courts to consider a defendant's untruthfulness "for the purpose of illuminating his need for rehabilitation and the society's need for protection." *Id.* at 12a-13a (quoting *Grayson*, 438 U.S. at 53). The court further noted that *Grayson* did not require "a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false," while the Sentencing Guidelines require just such a " 'wooden or reflex' enhancement." Pet. App. 13a (quoting *Grayson*, 438 U.S. at 55).

The court of appeals found that there are insufficient safeguards in place to prevent Section 3C1.1 from coercing a defendant into remaining silent at trial. In particular, the court believed that the trial judge's decision to enhance the defendant's sentence under Sentencing Guidelines § 3C1.1 is effectively unreviewable on appeal. "[I]n light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot." Pet. App. 14a. The admonition in the commentary to Sentencing Guidelines § 3C1.1 that a district court should view the defendant's testimony in the light most favorable to him was also ineffectual, the court believed, because "a defendant's testimony that has been apparently rejected in material respect by a jury will almost always compel a finding of untruthfulness." Pet. App. 14a. The court therefore concluded that "[t]he rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf." Pet. App. 15a.

4. The government sought rehearing en banc, which the court of appeals denied by a 6-6 vote. Pet. App. 16a-17a. Judge Wilkins filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Wilkinson, Niemeyer, and Luttig. *Id.* at 18a-28a. Judge Wilkins noted that "[n]ot only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton* v. *United States*, [111 S. Ct. 1854, 1857-1858 (1991)], to resolve the conflict." Pet. App. 19a n.2.

Judge Wilkins explained that because the Sentencing Commission sought to further traditional sentencing goals such as retribution, incapacitation, and deterrence, perjured testimony by the defendant is still an appropriate sentencing consideration, just as it was at the time of *Grayson*. Pet. App. 21a. In addition, he explained that, contrary to the panel's assumption, Sentencing Guidelines § 3C1.1 "is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted." Pet. App. 22a. In response to the panel's concern that a defendant whose sentence was enhanced because he committed perjury could not effectively challenge the district court's finding on appeal, Judge Wilkins cited a number of cases in which courts of appeals reversed what they saw as inappropriate applications of the perjury enhancement. *Id.* at 23a-24a. He added that "not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern." *Id.* at 24a.

Finally, Judge Wilkins found implausible the claim that a defendant would be chilled from testifying by the fear of receiving an enhanced sentence for perjury under Sentencing Guidelines § 3C1.1. To the contrary, Judge Wilkins explained, the Guidelines are likely to reduce any such chilling effect. He reasoned that under the Guidelines, a defendant "who previously confronted the possibility of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the down-side risk he faces has been quantified and limited." Pet. App. 27a-28a.

SUMMARY OF ARGUMENT

A. Historically, sentencing courts have been permitted to consider any relevant information, including crimes or misconduct by the defendant other than the offense of conviction. A defendant's prior record of criminal conduct has always been considered important to the sentencing decision, because it may reveal that a lengthy term of incarceration is necessary as retribution for the defendant's misdeeds, to incapacitate the offender, or to attempt to rehabilitate him. The probative value of a defendant's criminal record has been regarded as so weighty that a defendant's prior misconduct could be considered at sentencing even in the absence of a conviction. Courts have been permitted to consider a defendant's arrests, pending indictments, dismissed charges, charges reversed on appeal, and even charges ending in an acquittal.

Among the prior acts of criminal conduct that a sentencing court has been permitted to consider is a defendant's commission of perjury while testifying

at his trial. This Court endorsed that practice in *United States* v. *Grayson*, 438 U.S. 41 (1978). The Court rejected claims that allowing a trial judge to consider his first-hand observations of the defendant's perjury would improperly punish the defendant for having testified or would deter defendants from exercising their right to take the stand.

B. The principles underlying the decision in *Grayson* are still valid today. A sentencing judge may consider a broad range of relevant information, and a defendant does not have a right to give false testimony at trial. The Sentencing Guidelines fully embrace those principles. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable evidence at sentencing, and Section 3C1.1 requires the court to enhance the defendant's sentence if he obstructs justice, which includes committing perjury at trial. Section 3C1.1 is the vehicle by which the Guidelines implement the rule upheld by this Court in *Grayson*.

The Fourth Circuit, however, held that Guidelines § 3C1.1 is unconstitutional, for several reasons. None of those reasons is persuasive.

First, the court of appeals was troubled by the fact that Guidelines § 3C1.1 classifies a defendant's false testimony as "obstruction of justice," whereas *Grayson* treated the defendant's perjury as simply one factor that a sentencing court could consider in the exercise of its discretion. The label used to describe Section 3C1.1 should be immaterial, since the label has no independent effect. Section 3C1.1 also is not a disguised attempt to punish a convicted defendant for testifying. A defendant who perjures himself thereby indicates his willingness to break the law when he finds it in his interest, which establishes his

continuing danger to the community. A defendant's perjury therefore is relevant to the need for incapacitation.

Second, the court of appeals concluded that Section 3C1.1 is impermissible because it is mandatory and would tend to deter innocent defendants with prior convictions from testifying. But before the Guidelines went into effect, district courts had unfettered discretion to penalize a defendant up to the statutory maximum if the court found that the defendant testified falsely. While Section 3C1.1 requires that the defendant's base offense level be raised if he testifies perjuriously, it limits the amount of the enhancement. The limitation on the potential penalty for testifying falsely may make the chilling effect of the penalty less than it would be under a discretionary sentencing system, where the potential penalty is limited only by the statutory maximum penalty for the charged offense.

There is nothing improper about discouraging untruthful testimony; the "chilling effect" of a penalty such as the one set forth in Sentencing Guidelines § 3C1.1 is a matter of concern only if it chills truthful testimony. The risk that Section 3C1.1 will have such an effect is remote. It is highly unlikely that a defendant facing an unjustified conviction will be dissuaded from giving truthful, exculpatory testimony because he fears that the jury may unjustifiably convict him and the sentencing court may then find that he perjured himself and increase his offense level by two levels for sentencing purposes.

ARGUMENT

SENTENCING GUIDELINES § 3C1.1 CAN CONSTITUTIONALLY BE APPLIED TO ENHANCE A DEFENDANT'S SENTENCE IF THE COURT FINDS THAT THE DEFENDANT TESTIFIED FALSELY AT TRIAL

The question in this case is whether the Constitution permits a court to apply Sentencing Guidelines § 3C1.1 to a defendant who testifies falsely at trial. Nine courts of appeals have addressed that question. Each court other than the one below has held that the Constitution does not prohibit a district court from enhancing the defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant gave false testimony at trial.[1] Only the Fourth Circuit in this case and in *United States* v. *Craigo*, 956 F.2d 65 (1992), has ruled to the contrary.[2]

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[1] See *United States* v. *Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1195 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1098-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990); *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1539-1540 (10th Cir.), cert. denied, 497 U.S. 1009 (1990); *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

[2] After the Fourth Circuit issued its decision in this case, the Seventh and Eighth Circuits reconsidered the question whether Sentencing Guidelines § 3C1.1 may constitutionally be applied to perjury by the defendant at trial. Both courts reaffirmed their prior holdings and rejected the Fourth Circuit's analysis. *United States* v. *Jones*, 950 F.2d 1309, 1315-1316 (7th Cir. 1991); *United States* v. *Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991).

The decision below is clearly incorrect. Before the Sentencing Guidelines went into effect, a district court could consider at sentencing its belief that the defendant committed perjury when he testified. Nothing in the Sentencing Guidelines altered that well-settled rule or justifies the conclusion that the Constitution requires that a different balance must now be struck.

A. Before The Sentencing Guidelines Went Into Effect, A Sentencing Court Could Take Into Account The Fact That The Defendant Lied When He Testified

1. *Sentencing courts have long been authorized to consider all relevant sentencing information*

"It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute." *Carter* v. *Illinois*, 329 U.S. 173, 178 (1946). For that reason, this Court has long recognized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). In fact, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246.

To ensure that district courts would have the widest possible range of information available at sentencing, Congress expressly directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person

convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3577 (1982). The sentencing judge therefore has been authorized to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). A sentence imposed within statutory limits would not be disturbed unless it was "founded at least in part upon misinformation of constitutional magnitude." *Id.* at 447.

Applying those principles, this Court and the lower federal courts have uniformly concluded that a sentencing court may consider diverse information as long as the matters considered are reliably established and reasonably related to a legitimate sentencing goal. See *Tucker*, 404 U.S. at 447; *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948). Because of its obvious relevance to a number of sentencing considerations, the defendant's prior criminal conduct is viewed as a prime factor for the courts to consider at sentencing. See, *e.g.*, *Tucker*, 404 U.S. at 447; *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959); *Williams* v. *New York*, 337 U.S. at 244. A criminal record may show that prolonged incarceration of an offender is necessary to protect society by incapacitating the offender. Courts have also concluded that the interest in retribution and the need for rehabilitation are greater for a recidivist than for a first-time offender. Indeed, the probative value of that evidence has been considered so great that sentencing courts have been permitted to consider a defendant's prior misconduct even in the absence of a conviction. Thus, it has been held that a judge may consider evidence

concerning a defendant's uncharged criminal acts,[3] arrests,[4] pending indictments,[5] dismissed charges,[6] charges reversed on appeal,[7] or charges resulting in an acquittal.[8]

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[3] *E.g.*, *Williams* v. *New York*, 337 U.S. at 244; *United States* v. *Bass*, 535 F.2d 110, 118-120 (D.C. Cir. 1976); *United States* v. *Crowe*, 516 F.2d 824, 826 (4th Cir. 1975); *United States* v. *Strauss*, 443 F.2d 986, 990-991 (1st Cir.), cert. denied, 404 U.S. 851 (1971).

[4] *E.g.*, *Smith* v. *United States*, 551 F.2d 1193, 1195-1196 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *Houle* v. *United States*, 493 F.2d 915, 915 (5th Cir. 1974).

[5] *E.g.*, *United States* v. *Johnson*, 507 F.2d 826, 829-830 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975); *United States* v. *Metz*, 470 F.2d 1140, 1141-1142 (3d Cir. 1972) (collecting cases), cert. denied, 411 U.S. 919 (1973).

[6] *E.g.*, *United States* v. *Oritz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081-1082 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

[7] *E.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

[8] *E.g.*, *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.) ("It is well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."); *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

2. *A defendant's false testimony at trial is relevant sentencing information*

Among the facts that a sentencing court has been permitted to consider is the defendant's commission of perjury while testifying at his trial. Following this Court's 1949 decision in *Williams* v. *New York*, most federal courts of appeals concluded that a sentencing judge could properly take into account for sentencing purposes that a defendant committed perjury at his trial.[9] In 1978, this Court upheld that practice in *United States* v. *Grayson*, 438 U.S. 41.

Grayson explained that the "history of sentencing * * * demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." 438 U.S. at 53. With regard to perjury, the Court stated that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society

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[9] Compare *United States* v. *Nunn*, 525 F.2d 958 (5th Cir. 1976); *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975); *Hess* v. *United States*, 496 F.2d 936 (8th Cir. 1974); *United States* v. *Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States* v. *Cluchette*, 465 F.2d 749 (9th Cir. 1972); *United States* v. *Wallace*, 418 F.2d 876 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970); *United States* v. *Levine*, 372 F.2d 70 (7th Cir. 1967); and *Humes* v. *United States*, 186 F.2d 875 (10th Cir. 1951) (all ruling that a district court can consider a defendant's trial perjury), with *United States* v. *Grayson*, 550 F.2d 103 (3d Cir. 1977), rev'd, 438 U.S. 41 (1978); *Scott* v. *United States*, 419 F.2d 264, 268-269 (D.C. Cir. 1969) (adopting the contrary rule).

and prospects for rehabilitation and hence relevant to sentencing." *Id.* at 50. This Court found "persuasive" the proposition that even "[i]f the notion of 'repentance' is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes." *Id.* at 51.

Grayson also deemed "without basis" the claim that allowing courts to consider a defendant's false testimony would "chill" a defendant's willingness to exercise his right to testify on his own behalf. 438 U.S. at 54. As the Court explained, *ibid.*:

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. * * * Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

The Court treated as "entirely frivolous" the proposition that allowing courts to consider perjury as a sentencing factor would inhibit defendants from testifying truthfully. *Id.* at 55. In sum, *Grayson* made clear that the Constitution does not prohibit a court from enhancing the defendant's sentence on the ground that he perjured himself while testifying at trial.

B. The Sentencing Guidelines Have Not Altered The Constitutional Rule That A Sentencing Court May Consider A Defendant's Perjury At Trial

1. *The Sentencing Guidelines require a district court to enhance a defendant's sentence if he testifies falsely at trial*

The constitutional principles set forth in *Williams* v. *New York*, *Tucker*, and *Grayson* are still valid today. This Court has recently reiterated that a trial judge may consider a broad range of relevant information at sentencing. See *Dawson* v. *Delaware*, 112 S. Ct. 1093, 1097 (1992); *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2606 (1991). It is also still the law that a defendant does not have a right to give false testimony at trial. See *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.").

The Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines are entirely consistent with those principles. In the Act, Congress directed the Sentencing Commission to adopt a comprehensive system of guidelines to channel the district courts' sentencing discretion. See *Burns* v. *United States*, 111 S. Ct. 2182, 2184 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 367-370 (1989). At the same time, Congress did not restrict the information that courts may consider at sentencing. On the contrary, Congress reaffirmed the prior rule that "[n]o limitation" should be placed on the information that sentencing courts may take into account. 18 U.S.C. 3661.

The Sentencing Guidelines incorporate that principle as well. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable

evidence at sentencing.[10] If there is a question about the reliability of the information available to the court, the Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). What is more, no Sentencing Guideline provides that evidence is barred from consideration on the ground that it concerns illegal conduct for which the defendant has not been convicted.[11] District courts today may therefore still conduct the wide-ranging inquiry that the Court envisioned in *Williams* v. *New York*, *Tucker*, and *Grayson*.

In particular, the Sentencing Guidelines require a district court to consider whether the defendant gave false testimony at trial. Section 3C1.1 of the Guidelines requires the court to impose a two-level enhancement for obstruction of justice, and the accompanying commentary explains that "the types of conduct to which this enhancement applies" including "committing * * * perjury."[12] Sentencing Guidelines § 3C1.1, Application Note 3. Accordingly, Sentencing Guidelines § 3C1.1 authorizes—indeed, requires—a district court to enhance a defendant's sentence for the reason upheld in *Grayson*. As the Seventh Circuit put it, Section 3C1.1 is "merely the technical means by which sentencing courts can continue under the Guidelines to consider the kind of evidence approved by the Court in *Grayson*." *United States* v. *Contreras*, 937 F.2d 1191, 1195 (1991).

[10] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

[11] The Guidelines do not require a conviction unless a provision expressly imposes such a requirement. See Sentencing Guidelines § 1B1.3, Application Note 5 (Nov. 1991): "A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. * * * Unless such an express direction is included, conviction under the statute is not required."

2. *Increasing a defendant's sentence because he testified falsely at trial does not violate the defendant's right to testify in his own behalf*

The court of appeals concluded that applying the enhancement in Sentencing Guidelines § 3C1.1 to a testifying defendant would violate his constitutional right to testify, see *Rock* v. *Arkansas*, 483 U.S. 44, 49-53 (1987), for several reasons. The reasons given by the court of appeals, however, do not justify that conclusion.

a. The court of appeals found it significant that Sentencing Guidelines § 3C1.1 characterizes a defendant's false testimony as "obstruction of justice,"

[12] The version of the commentary that was in effect at the time of respondent's sentencing was essentially the same. It provided that "testifying untruthfully * * * concerning a material fact" was one of the grounds for applying the Section 3C1.1 enhancement. Guidelines § 3C1.1, Application Note 1(c) (Nov. 1989). Although the Guideline itself has been amended since the time of respondent's sentencing, the only material change was the addition of a reference to the obstruction of justice at sentencing. United States Sentencing Comm'n, *Guidelines Manual* App. C, amendment 347, at 163 (Nov. 1991). The other changes in the Guideline and application notes were intended only for clarification. *Ibid.*

whereas *Grayson* treated the defendant's perjury as a factor bearing on his prospects for rehabilitation and society's need for protection that a court could consider (or ignore) in the exercise of its sentencing discretion. Pet. App. 12a-13a. The court of appeals' concern in this respect appears to be that the label affixed to Guidelines § 3C1.1 reflects the purpose of punishing the defendant for having committed perjury, instead of an intent to use that factor as one of many from which a court assesses the defendant's prospects for rehabilitation, as *Grayson* contemplated.

It is true that the Guidelines do not leave the consideration of a defendant's perjury to the court's discretion. In contrast to the discretionary sentencing laws, the Sentencing Guidelines direct a court to enhance the defendant's sentence for perjury, and they specify precisely how much weight that factor should have. But the mandatory nature of federal sentencing is simply a natural consequence of channeling the courts' sentencing discretion through a system of guidelines; it is not a veiled effort to punish a defendant for a new offense. The use of the label "obstruction of justice" to describe the enhancement for perjury at trial thus does not make that enhancement unconstitutional.

Enhancing a defendant's punishment based on his willingness to commit perjury is consistent with the penological goals on which the Sentencing Guidelines rest, which include the incapacitation of offenders who are likely to continue committing crimes. 18 U.S.C. 3553(a)(2); *Mistretta*, 488 U.S. at 367. A defendant who perjures himself at trial indicates that he is prepared to break the law whenever he finds it in his interest. In that respect, the commission of perjury is no different from conduct such as threaten-

ing a witness, tampering with the jury, or suborning perjury, all of which reveal the defendant's lack of respect for important rules governing the conduct of trials. Since a willingness to break the law is strongly indicative of the defendant's continuing danger to the community, that factor justifies incapacitating him for a longer period than would otherwise be necessary.[13] The enhancement authorized by Sentencing Guidelines § 3C1.1 thus implements a penological goal identified by the Sentencing Reform Act of 1984 and does not punish a defendant for a crime not charged against him.

It is true that the Court in *Grayson* based its ruling in part on its conclusion that a defendant's willingness to lie under oath is "probative of his prospects for rehabilitation." 438 U.S. at 52. It is also the case that federal sentencing policy no longer looks to rehabilitation as a basis for selecting a sentence. The Sentencing Reform Act of 1984 "rejects imprisonment as a means of promoting rehabilitation," see 28 U.S.C. 994(k), and instead directs that "punishment should serve retributive, educational, deterrent, and incapacitative goals." *Mistretta* v. *United States*,

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[13] The Guidelines, of course, reflect traditional sentencing practice by placing great weight on the defendant's prior commission of criminal acts, through the use of the criminal history score as one of the two principal determinants of the defendant's sentence. The commission of perjury at trial is in some respects an especially strong indicator of the defendant's willingness to continue to engage in criminal conduct, since it reflects criminal conduct occurring immediately before the sentencing proceeding, not conduct that may have occurred years before, as is often the case when prior convictions are considered for sentencing purposes.

488 U.S. at 367.[14] However, the fact that imprisonment is not to be imposed under the Guidelines for the purpose of rehabilitating the defendant does not mean that the constitutional rule adopted in *Grayson* is no longer valid. The Court in *Grayson* made it clear that the practice of considering a defendant's untruthfulness at trial serves not only the defendant's need for rehabilitation, but also "society's need for protection." 438 U.S. at 53. Indeed, the likelihood that a defendant will continue to commit offenses, *i.e.*, that he will not be rehabilitated as a result of his prosecution and punishment, relates directly to the need to protect society by incapacitating the defendant for a lengthy period of time.[15] It is therefore entirely consistent with *Grayson* to conclude that the defendant's perjury is a sensible factor to consider in deciding what term of incapacitation is necessary for the protection of society.

b. The court of appeals also noted that in *Grayson* this Court held that courts enjoy the discretion to enhance a defendant's sentence if he testified falsely, whereas Guidelines § 3C1.1 *requires* a court to enhance a defendant's sentence if the court determines that the defendant perjured himself. Pet. App. 13a. The court relied on the following passage from *Grayson*, 438 U.S. at 55, quoted at Pet. App. 13a:

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[14] Congress's conclusion on that score reflects the current view among criminologists that rehabilitation is dubious as a penological theory and is virtually unattainable in most cases as a practical matter. *Mistretta*, 488 U.S. at 365, citing N. Morris, *The Future of Imprisonment* 24-43 (1974), and F. Allen, *The Decline of the Rehabilitative Ideal* (1981).

[15] Incapacitation is, of course, a legitimate sentencing goal, *Spaziano* v. *Florida*, 468 U.S. 447, 461-462 (1984); *Gregg* v. *Georgia*, 428 U.S. 153, 183 n.28 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

> Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

The court believed the "automatic § 3C1.1 enhancement," Pet. App. 12a, is "precisely the 'wooden or reflex' enhancement disclaimed by the Court" in *Grayson*, Pet. App. 13a, and could well tip the scales against testifying for "an innocent defendant with prior convictions," *id.* at 11a-12a. In addition, the court feared that there were insufficient safeguards to prevent the obstruction of justice enhancement "from unfairly coercing defendants, guilty or innocent, into remaining silent at trial." *Id.* at 14a. In the court's view, the enhancement could be applied to every testifying defendant who is convicted, since the guilty verdict would effectively insulate from challenge on appeal the judge's decision to enhance a defendant's sentence. *Ibid.* Each of those conclusions is wrong.

Although *Grayson* did not require enhancement of a defendant's sentence in every case in which he committed perjury, the Court in *Grayson* did not in any way suggest that Congress or an agency like the Sen-

tencing Commission could not make a general judgment that perjury should be considered an aggravating factor in the sentencing calculus. Section 3C1.1 of the Sentencing Guidelines does just that. The Guidelines generalize and codify many sentencing considerations that were formerly taken into account in a less regularized fashion. As in the case of other sentencing factors, the Guidelines require that courts consider trial perjury in sentencing, while at the same time placing limits on the effect that that factor can have on the sentencing decision.

Contrary to the court of appeals' view, Section 3C1.1 is not likely to deter defendants from exercising their right to testify in their own behalf. At the outset, it is important to note that it is no criticism of the practice of enhancing sentences for perjury that it may inhibit defendants from presenting perjurious testimony. See *Grayson*, 438 U.S. at 54. There is no right to commit perjury, even in one's own defense. See *Nix* v. *Whiteside*, *supra*; *United States* v. *Wong*, 431 U.S. 174, 178-189 (1977); *Harris* v. *New York*, 401 U.S. 222, 225 (1971). Perjury at trial, even on the part of the defendant himself, undermines the proper functioning of the criminal justice system. Accordingly, any mechanism that discourages perjury is not only permissible, but affirmatively desirable.

While applying Guidelines § 3C1.1 to perjured testimony at trial may discourage the giving of false testimony in some cases, it is highly unlikely to discourage defendants from giving truthful testimony in their own defense. A defendant's overriding goal when he goes to trial is avoiding a conviction; his decision whether to testify will therefore almost certainly turn on his judgment as to whether testifying

will increase the chances of his acquittal. That decision in turn depends upon a delicate balancing of a number of factors, such as the credibility of his testimony, his prior criminal record and susceptibility to impeachment, his capacity to withstand cross-examination effectively, the strength of the government's case, and the availability of other defense evidence. It would be the rare defendant who, having determined that an assessment of those factors dictates that he take the witness stand, would jeopardize his chance of acquittal by forgoing the presentation of truthful, exculpatory testimony because of concern that his story would appear false, the jury would find him guilty, and the trial judge would erroneously conclude that he was testifying falsely and increase his base offense level by two levels at sentencing.

Moreover, to the extent that a truthful defendant considers the possibility of a sentence penalty for perjury, there is no reason to believe that he will be more deterred from testifying by Guidelines § 3C1.1 than he would have been before the Sentencing Guidelines went into effect. As Judge Wilkins noted in his dissent from denial of en banc review, a defendant can now make a precise calculation of what perjury might cost him, *i.e.*, a two-level increase in his base offense level. Pet. App. 27a-28a. Previously, district courts enjoyed unfettered discretion to penalize a defendant up to the statutory maximum if the court found that the defendant had testified falsely. Although Section 3C1.1 requires an increase in the defendant's base offense level if the defendant testifies falsely, it limits the amount of the increase. By so doing, Section 3C1.1 may well have less effect in discouraging defendants from testifying than the prior, discretionary sentencing system.

The court of appeals believed that the enhancement imposed by Sentencing Guidelines § 3C1.1 would be applied to every testifying defendant who is convicted. Pet. App. 13a-14a.[16] That belief is mistaken. As noted above, Section 3C1.1 authorizes an enhancement only if the court finds that the defendant committed perjury while testifying. That distinction is important, because a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1.

That point is illustrated by the Seventh Circuit's decision in *United States* v. *Lozoya-Morales*, 931 F.2d 1216 (1991). There, the district court penalized the defendant under Sentencing Guidelines § 3C1.1 for his untruthful trial testimony, stating that "[i]f a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth." 931 F.2d at 1218. The court of appeals rejected that approach stating that it is improper to "[i]mpos[e] the penalty automatically from a jury verdict that concededly does not establish the defendant lied in his testimony." *Id.* at 1219. Only if the court finds that the defendant perjured himself (or if the record compels that conclu-

[16] Relying on a statement made at the oral argument by the Assistant United States Attorney, the Fourth Circuit believed that the government's position is that "every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." Pet. App. 10a. That is not our position. In our rehearing petition, we pointed out that we do not take—in fact, we quite affirmatively reject—the position that every testifying defendant who is convicted should, for that reason alone, receive an enhancement under Sentencing Guidelines § 3C1.1. As explained in the text, district courts need not find that every defendant who testifies and is convicted committed perjury.

sion) would the Section 3C1.1 enhancement be warranted. 931 F.2d at 1219-1220. See also *United States* v. *Martinez*, 922 F.2d 914, 925-926 (1st Cir. 1991) (rejecting claim that defendant may be found to have committed obstruction of justice under Section 3C1.1 simply because he testified and the jury nevertheless convicted him).

The court of appeals expressed skepticism that district courts can or will apply Guidelines § 3C1.1 properly and that courts of appeals can police district courts' actions. Pet. App. 14a. But there is no reason to be pessimistic about the ability and willingness of district and circuit courts properly to apply Section 3C1.1. The other circuits that have addressed this issue have not found the undertaking unmanageable, nor have they found that district courts have behaved in a fashion that defies the ability of courts of appeals to review the application of Section 3C1.1 in particular cases. Moreover, if this Court makes clear how Section 3C1.1 should be applied, the risks that it will be applied improperly by lower courts should be greatly reduced. *Grayson* relied on "[t]he integrity of the judges, and their fidelity to their oaths of office" as "the only, and in our view adequate, assurance against" the misuse of their "first-hand observation of perjury." 438 U.S. at 54. This Court should have no less confidence in the district and circuit courts today.

Finally, to the extent that the decision below rests on the notion that it is impermissible to burden the defendant's constitutional right to testify by attaching a cost to the exercise of that right—the risk that a court will enhance the defendant's sentence for perjury if he is convicted—the court's analysis is misguided. To say that a defendant has a constitutional

right is not to say that he must be allowed to exercise it free of any risk of adverse consequences.

The Court rejected a similar argument in *Crampton* v. *Ohio*, a companion case of *McGautha* v. *California*, 402 U.S. 183 (1971). *Crampton* involved a state procedure by which guilt and punishment were determined by the jury at a single trial. Under the Ohio unitary-trial rule, the defendant could remain silent on the issue of guilt only by surrendering his chance to be heard by the jury on the issue of punishment and could testify on the issue of punishment only by waiving his privilege against compelled self-incrimination on the question of guilt. The defendant contended that that election "create[d] an intolerable tension between constitutional rights." *Id.* at 211. This Court disagreed. It stated that "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow," and that the situation faced by defendants in unitary trials was no different from a host of other "choices with which criminal defendants and their attorneys are quite routinely faced." *Id.* at 213, 215. It is, said the Court, "not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify." *Id.* at 215.

Those principles were expressed in response to the contention that a defendant has the right to speak to his sentencer free from any adverse consequences on the issue of guilt. They are equally applicable to the analogous claim that a defendant must be allowed to testify at trial without apprehension that a court will find that he testified falsely and consider that false testimony at sentencing. The Court would

not credit the argument that a sentencing court should not take into account that a defendant tampered with the jury or suborned perjury at his trial because considering those factors might chill the exercise by other defendants of their rights to go to trial or put on a defense. The same principle should apply to a defendant's commission of the crime of perjury.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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